INTERSTATE COAL & IRON CO. *v.* CLINTWOOD COAL & TIMBER CO. *et al.*

Nov. 23, 1905.
On Rehearing, June 28, 1906.
[54 S. E. 593.]

1. Evidence—Presumptions—Illiteracy.—Where a party to an instrument signed the same with a cross-mark, it would be presumed that he was illiterate and could not read, in the absence of evidence to the contrary.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 91.]

2. Evidence — Compromise Agreement — Parties — Admissions.—Where a prior owner of the land in controversy in defendant's chain of title was not a party to a prior suit affecting the title, nor to a compromise thereof, the fact that he signed a power of attorney by mark with others, and was present at a meeting of landowners for the purpose of having the compromise set aside, was insufficient to charge him with knowledge of the terms of the compromise, so as to authorize its introduction as an admission against his interest.

3. Same—Admissions after Termination of Estate.—An admission by a prior owner of land, after the termination of his estate and while he was occupying the land as tenant of his vendee, was inadmissible to affect the vendee's title.

4. Same—Opinions.—In ejectment to recover certain land, evidence as to whether an attorney employed to perfect a title to the land considered it necessary that two prior owners should have signed a release deed was inadmissible.

5. Mines and Minerals—Minerals in Land—Separate Ownership.—The ownership of coal or other underlying mineral may be separated from the ownership of the surface by a deed of record, after which there will be two estates in the same land.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 153-158.]

6. Same—Estates Created.—Where the ownership of underlying minerals has been separated from the ownership of the surface by a deed, the owners of the land and minerals are neither joint tenants nor tenants in common, but owners of distinct estates in different subjects in severalty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, §§ 159-161.]

7. Evidence—Presumptions—Burden of Proof.—It being presumed that the owner of the surface of land owns all above and beneath the surface, the burden is on him who claims the contrary to prove that there has been a severance of the interest and title by a deed of record, or by proof of such facts and circumstances brought home to the party sought to be charged as will affect his conscience with notice

of adverse rights or will serve to put him on inquiry which will lead to such knowledge.

8. Ejectment—Adverse Possession.—Where from the date of certain deeds from a prior owner of the land in controversy to his son in 1887 and 1888 the son held adversely under color of title, and at the date suit was brought had with his vendee been in possession continuously for more than 15 years, title had been acquired by adverse possession, and questions with reference to the title prior to such conveyances were immaterial.

9. Same—Instructions.—Where one of defendant's grantors had acquired full title to the land in controversy, including the mineral therein, by adverse possession, an instruction that the fact that the person from whom such grantors acquired title did not claim one-half of the coal underlying the land in controversy between the year 1883 and the date of the sale of his interest to his brother was wholly immaterial was properly given.

10. Trial—Instructions—Applicability—Evidence.—An instruction assuming facts not sustained by the evidence is properly refused.

On Rehearing.

11. Evidence—Relevancy—Immaterial Issues.—Where the sole purpose of the introduction of an agreement and power of attorney in ejectment was to affect a prior grantor in defendant's chain of title with notice of a certain compromise which the court had already held was inadmissible, such agreement and power of attorney were also properly excluded.

12. Appeal—Review—Presumptions—Exclusion of Evidence—General Objection.—Where an objection to the introduction of certain documents was general, their exclusion would be sustained, if the documents were inadmissible for any reason.

13. Courts—Opinions—Scope—Questions Not Raised by Record.—The functions of the appellate court are exhausted when it has ruled on the specific assignments of error submitted, and it has no jurisdiction to file a mere advisory opinion touching extraneous questions expressed for the purpose of influencing future litigation.

Appeal from Circuit Court, Dickensen County.

Ejectment by the Interstate Coal & Iron Company against the Clintwood Coal & Timber Company and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

The following are the instructions given on behalf of both parties:

The court at plaintiff's request gave the following instructions:

"(1) The court instructs the jury that all written instruments should be construed according to their true intent and meaning, and further tells the jury that it is the province of the court to determine the true intent and meaning of all written instruments

introduced in evidence. And the court further tells the jury that, taking into consideration the fact that the north line of patent No. 20, of 5,000 acres, introduced by plaintiff, calls for running with a line of patent No. 21, of 5,000 acres; that the first corner called for in said patent No. 20 is a white oak, walnut, and ash, called for as the southeast corner of patent No. 21, of 5,000 acres, and that the fourth corner called for in said patent No. 21 is likewise a white oak, walnut, and ash; that the second corner called for in said patent No. 20 is two poplars, and that the third corner called for in said patent No. 21 is likewise two poplars; that the first line of patent No. 9, of 10,000 acres, calls for running N. 23 degrees W. with lines of patent Nos. 20 and 21, of 5,000 acres; that the first line of said patent No. 21 calls for running S. 67 degrees W. with patent No. 8, of 4,000 acres, and that the second line of patent No. 15, of 5,000 acres, calls for running N. 23 degrees W. with line of Nos. 20 and 21, of 5,000 acres—the court is of opinion that said patent No. 21, of 5,000 acres, is a parallelogram, lying immediately northward of patent No. 20, of 5,000, adjoining the said last-named patent, of the same length and width as said last-named patent; that the beginning corner of said patent No. 21 is at the southeast corner of patent No. 8, of 4,000 acres, instead of the southwest corner; that the second line in said patent No. 21 should be run S. 23 degrees E., instead of S. 23 degrees W.; that the third line of said patent should be run N. 67 degrees E., instead of N. 7 degrees E. and that the fourth corner of said patent No. 21 is the same as the beginning corner of said patent No. 20, of 5,000 acres; that in determining the location on the ground of said patent No. 21 the jury will act in accordance with this instruction.

"(2) The court further instructs the jury that it appears the various patents introduced by the plaintiff lying to the west of the line running N. 23 degrees W. from Dump's creek call for or are called for by patents which extend to and call for Guest's river on the west, and that the law will extend the said patent bordering on the said line running N. 23 degrees W. from Dump's creek until they meet the said patent which border on Guest's river, and that there is no vacant land between said patents; that is, there is no land between said lines running N. 23 degrees W. and Guest's river which is not covered by some of said patents; and if they believe from the evidence that the northeast corner of patent No. 1, of 1,500 acres, is properly located on Dump's creek, as shown by the map of Surveyor Keel, and that the land in controversy is properly located as shown on said map, they will find the said land in controversy is covered by some of the Richard Smith patents introduced by the plaintiff: and, if this be the case, then the patent to James Swan introduced by the defendant is void.

"(3) The court instructs the jury that if patents No. 21, of 5,000 acres, or No. 9 or 10, of 10,000 acres, or any of them, introduced by the plaintiff, cover the land in controversy, and if it is also covered by the deed from Burns, commissioner, to James Campbell, then plaintiff has the legal title to the coal and other minerals in, on, and under said land, and the jury should so find, unless they believe from the evidence either that Richard Smith conveyed said land to John Warder in 1806, or that the defendant, the Clintwood Coal & Timber Company, and those under whom it claims, have acquired title to said coal and minerals by adverse possession.

"(4) The jury are further instructed that whereas, in the deed from Richard Smith to Warders, he expressly excepted 50,000 acres or thereabout lying at or near the junction of Guest's and Clinch river, and binding on both of said rivers, which he had theretofore sold to the Frenchman, De Teubeuf, and afterwards the heirs of Richard Smith through Burns, commissioner, conveyed the tract of land to James Campbell, who claimed under said Frenchman, describing the said land as containing 55,000 acres, more or less, and as lying on Guest's and Clinch rivers, they are entitled, if they believe from the evidence that said land so conveyed to James Campbell lies within the outside boundary of the land conveyed by said Smith to the Warders and also lies at or near the junction of the Guest's and Clinch rivers, and binds on both of said rivers, without more or other evidence, to conclude that the said land so conveyed by the said Burns, commissioner, to the said Campbell, is the same land which was excepted in the said deed from Richard Smith to the Warders."

"(12) The court further instructs the jury that the deed read in evidence by the defendants from Richard Smith to John Warder and others is no evidence of an outstanding title to the land in controversy, unless they believe from the evidence that the outside boundary of said deed covers the land in question, nor unless they further believe from the evidence that the reservation in said deed in favor of the Frenchman, De Teubeuf, does not cover the land in controversy."

The court at defendant's request gave the following instructions:

"(1) The court instructs the jury that if they believe from the evidence that in June, 1861, Jacob Chaney entered into possession of the land in controversy under color of title describing the whole thereof, and that in 1864 he (the said Chaney) sold said land to Wm. Sutherland by a writing describing the same, and that Wm. Sutherland then or shortly afterwards gave the said land to his two sons, Jasper Sutherland and E. T. Sutherland, and that Jasper Sutherland went on said land,

cleared, cultivated, and improved the same, and held possession thereof openly, notoriously, and continuously for 10 years after January 1, 1869, then good title to the said land in controversy, and each and every part and parcel thereof, was thereby vested in him (the said Wm. Sutherland), which could not be divested, except by deed, and that after said 10 years had elapsed neither said Wm. Sutherland, Jasper Sutherland, nor E. T. Sutherland could by any act short of a conveyance divest themselves of the legal title to said land, or any part thereof; and if the jury so believes they shall find for the defendants."

"(3) The court instructs the jury that, even should they believe that E. T. Sutherland did not claim one-half of the coal in controversy between the year 1883 and the date of the sale of his interest to his brother Jasper, that fact shall be treated by the jury as wholly immaterial in this case.

"(4) The court further instructs the jury that, if they believe from the evidence in this case that the land in controversy is included in the deed from Jacob Blair to Jacob Chaney of 1861, offered in evidence, and that the said Chaney afterwards sold the said land by a written contract to Wm. Sutherland in 1864, and that said Wm. Sutherland gave the said land to Jasper Sutherland and Elijah Sutherland, and that the said Jasper Sutherland took the actual possession of said land pursuant to said gift, and remained in the actual continuous and exclusive possession thereof, claiming the same as his own, for the period of 10 years from the 1st day of January, 1869, then the jury should find for the defendants.

"(5) The court further instructs the jury that, if they believe from the evidence in this case that Wm. Sutherland conveyed the land in question to Jasper Sutherland in the year 1887 or 1888, then the deed from the said Wm. Sutherland to the Virginia, Tennessee & Carolina Steel & Iron Company in the year 1894 passed no title to the said Virginia, Tennessee & Carolina Steel & Iron Company.

"(6) The court instructs the jury that the plaintiff must show a legal title in itself and a present right of possession at the time of the commencement of this action before the defendants are called upon to show anything, and the party in possession is presumed to be the owner till the contrary is proved.

"(7) The court further instructs the jury, if they believe from the evidence in this case that Jasper Sutherland was at any time living upon, occupying, and in actual possession of the land in question, then such possession during its continuance was notice to all persons whomsoever of whatever claim said Jasper Sutherland had to said land in question.

"(8) The court instructs the jury that adverse possession is the actual occupied possession under color and claim of title, and

it is wholly immaterial whether this claim of title be under a good or bad, a legal or an equitable, title.

"(9) The court instructs the jury that, if they believe the defendants have had adverse possession of the land in dispute for the period of 10 years prior to this suit, this gives the defendants the right to recover, even against the strongest proof of a title which, independent of such adversary possession, would be a better title, and the jury should find for the defendants.

"(10) The court instructs the jury that if they believe, from the evidence in this case, that Jasper Sutherland, Wm. B. Sutherland, and the Clintwood Coal & Timber Company have been in adverse possession of the land described in the plaintiff's declaration under color of title since the deed, or either of the deeds, from Wm. Sutherland to Jasper Sutherland, made in the year 1887 or 1888, respectively, continuously for 10 years or more prior to the bringing of this suit, they should find for the defendants.

"(11) The court instructs the jury that if they believe, from the evidence in this case, that Jacob Blair conveyed the land in controversy to Jacob Chaney by the deed of 1861 offered in evidence, and that the said Jacob Chaney sold said land by a written contract in 1864 to the said Wm. Sutherland, and that the said Wm. Sutherland gave the said land to Jasper Sutherland and Elijah Sutherland, and that Jasper Sutherland, pursuant to said gift, took the actual possession of said land, claiming an undivided one-half interest therein as his own, then, in that event, his possession was the possession of the said Wm. Sutherland, and that if the said Jasper Sutherland so remained in the actual, continuous, exclusive, adverse, and notorious possession of the said land, claiming the said undivided one-half interest therein as his own, for the period of 10 years from the 1st day of January, 1869, and that the said Wm. Sutherland conveyed the whole of the said tract of land to the said Jasper Sutherland in 1887, then the jury should find for the defendant."

The court was requested by plaintiff to give the following instructions, which were refused, and to which plaintiff excepted:

"(1) The jury are further instructed that, in order for one to acquire title to land by possession, he must prove that he, or those under whom he claims, have had the continuous, open, notorious, and adverse possession thereof for a period of 10 years before the commencement of the suit in which such title is brought into question, and must further show that during the whole of such period the party in possession was claiming the said land as his own, or, if he be a lessee, then as the land of lessor, and the jury are therefore instructed that if they believe, from the evidence, that between 1887, when Jasper Sutherland obtained a deed for the land in question from his father, and 1894,

when the same was sold and purchased by Wm. Sutherland, he (the said Jasper Sutherland) did not claim the coal and other minerals in, on, and under said land, then they cannot find that the defendants have acquired title thereto by possession.

"(2) The jury are further instructed that it does not appear from the evidence that Jasper Sutherland had any color of title for the land in question until the —— day of January, 1887, and therefore the defendants cannot rely upon adverse possession until on and after the —— day of January, 1887.

"(3) The jury are further instructed that if they believe, from the evidence, that Wm. Sutherland in the year 1883 signed what is known in this record as the 'Imboden Compromise,' and that Jasper Sutherland knew of said compromise before he obtained his deed from his father in 1887, and that in 1888 the said Wm. Sutherland and others brought a suit in equity against Jack and C. D. Carter and others to set aside the compromise, and that Wm. B. Sutherland knew of said compromise and of said suit before he purchased the land, or before he fully paid therefor and obtained his deed therefor in 1901, and that the Clintwood Coal & Timber Company, through its agent, Geo. W. Sutherland, knew before it purchased the said land that the plaintiff was claiming title to the coal and other minerals thereon, then they are instructed that the possession of the surface of said land from 1893 on was not adverse to the plaintiff and those under whom it claims, in so far as the coal and other minerals are concerned, and that the defendants cannot rely upon adverse possession to defeat the plaintiff's claim to said coal and othe minerals.

"(4) The jury are further instructed that, even though they may believe that Wm. Sutherland gave an undivided one-half interest in the land to his son Jasper Sutherland before 1883, yet, if they believe that he did not give the remaining one-half interest therein to his son Elijah Sutherland until after 1883, and that in 1883 said Wm. Sutherland entered into said Imboden compromise, then possession of Jasper Sutherland and those claiming under him of the said land from 1883 on was not adverse to the plaintiff and those under whom it claims as to an undivided one-half interest in the coal and other minerals in, on, and under said land, and the defendants could not defeat the claim of the plaintiff to such undivided one-half interest in the coal and other minerals on the land by reason of adverse possession.

"(5) The jury are further instructed that, even though they may believe that Wm. Sutherland gave the land in controversy to his son Jasper Sutherland before the year 1883, and that Wm. Sutherland therefore had no right to enter into said Imboden compromise, but that he nevertheless did enter into the same,

and that the said Wm. Sutherland, together with others, afterwards, in 1888, instituted a suit in equity to set the said compromise aside, and that Jasper Sutherland prior to bringing of said suit entered in an agreement with one F. A. Stratton and agreed to convey to him one-half of the coal on the land in controversy, provided he would employ counsel and have said suit brought and succeeded in getting the said compromise set aside, and that the said suit was brought pursuant to the agreement, and that afterwards, to wit, in 1894, the said Wm. Sutherland agreed that the said suit should be dismissed, and that he would make a deed to the Virginia, Tennessee & Carolina Steel & Iron Company pursuant to said compromise, and that the said suit was dismissed accordingly, and that Wm. Sutherland did make the said deed, and that Wm. B. Sutherland had notice of said compromise agreement and of the said suit before he purchased said land, or before he fully paid and obtained a deed therefor, and that the Clintwood Coal & Timber Company, before it purchased the said land, had notice of the plaintiff's claims thereto, then they are estopped from denying that the said Wm. Sutherland had authority to enter into the said compromise, and further estopped from controverting the title of the said Wm. Sutherland to the coal and minerals in, on, and under said land, and from disputing the plaintiff's claim thereto, and the jury will find for the plaintiffs as to the said coal and minerals.

"(6) The court further instructs the jury that, when it appears that the plaintiff and defendant in an ejectment suit trace title back to and claim under the same person, the defendant cannot deny the title of such person under whom both he and the plaintiff claim, and in such case it is necessary for the plaintiff to prove that such person under whom both he and the defendant claim really had title to the land in controversy; and if, therefore, they believe from the evidence that Wm. Sutherland did not dispose of an undivided one-half interest in the land in controversy until after the date of what is known in this record as the 'Imboden Compromise,' and that he (the said Wm. Sutherland) had the right to sign said compromise at least to an undivided one-half interest in said land, and that he did sign the same, and that Elijah Sutherland recognized the right of said Wm. Sutherland to sign the said compromise, and that the said Wm. Sutherland thereafter gave the said undivided one-half interest in said land to said Elijah Sutherland, and that the said Elijah Sutherland thereafter sold his interest in the said land to his brother Jasper Sutherland, and that the said Jasper Sutherland, before he purchased from the said Elijah Sutherland, had notice of the said compromise, and that Wm. B. Sutherland likewise had notice of the said compromise before he purchased the said land at the judicial sale in 1894, or before

he fully paid therefor and obtained deed therefor, and that the Clintwood Coal & Timber Company, before it purchased the said land, had notice of the plaintiff's claim thereto, and that the said Wm. Sutherland in the year 1894 executed to the Virginia, Tennessee & Carolina Steel & Iron Company a deed conveying to it the coal and other minerals in, on, and under said land, and that the title of the said Virginia, Tennessee & Carolina Steel & Iron Company to said coal and other minerals passed by divers mesne conveyances to the plaintiff before the commencement of this suit, then the defendants are estopped from denying that the said Wm. Sutherland had the right to make said compromise as to an undivided one-half interest in said coal and minerals, and the possession of defendants from 1883 on was not adverse to the plaintiff as to the said one-half undivided interest in the said coal and other minerals.

"(7) The jury are further instructed that if they believe, from the evidence, that the plaintiff and those under whom it claims in good faith believed that Wm. Sutherland had the right to enter into what is known as the 'Imboden Compromise,' and that after the date of said compromise they relied thereon, and that Jasper Sutherland knew that they were relying thereon, then it was the duty of the said Jasper Sutherland, if he was claiming the coal and other minerals on said land, to make this fact known to the plaintiff, or those under whom it claimed, and unless and until he did so make known his claim his possession of the surface of the said land was not adverse to the plaintiff and those under whom it claimed. If the jury believe from the evidence that Wm. Sutherland gave the land in controversy to Jasper Sutherland in 1864, but made him no writing therefor, then the possession of said Jasper Sutherland was confined to his actual inclosures on said land, if he had any, up to January, 1887, the date on which he obtained a deed from his father for said land."

J. C. Smith, W. A. Ayers, and *J. Norment Powell,* for plaintiff in error.

Ayers & Fulton, O. M. Vicars, A. A. Skeen, S. H. Sutherland, and *R. E. Chase,* for defendants in error.

KEITH, P. This is an action of ejectment, brought by plaintiff in error, to recover a certain tract of land lying in Dickenson county, and the real subject of controversy is the coal underlying the surface, rather than the surface itself; the claim upon the part of plaintiff in error being that the coal and the surface are held by distinct titles, and that, while defendants in error may be the owners of the surface, they wrongfully claim the minerals beneath it.

Upon the trial there was a verdict and judgment for the de-

fendants, and a writ of error was allowed to the Interstate Coal & Iron Company, which brings the case before us for review.

We shall assume in this opinion, without further investigation, that plaintiff in error made out a complete paper title to the premises in question.

The case of defendants in error rests upon their claim of adversary possession, and upon that defense the facts are as follows: Jacob Chaney conveyed this land to William Sutherland in 1864 by deed which has been lost or destroyed. William Sutherland put his son, Jasper, into immediate possession, and Jasper has since then continuously lived upon the land. No deed or other writing, however, was ever given by William Sutherland to Jasper until the year 1887. It appears that William Sutherland intended this tract of land for his two sons, Jasper and Edward T. Sutherland. There is uncertainty in the proof as to whether Jasper Sutherland occupied the land from 1864 until 1887 as a donee of William Sutherland or as his tenant. E. T. Sutherland sold whatever interest he had in the land to his brother Jasper, but he made no deed, the title being still in their father, and on January 15, 1887, William Sutherland conveyed the land to Jasper. In February, 1888, he and his wife executed another deed to Jasper for the same land, in order to correct certain errors in the former deed and to make the description thereof more specific. Jasper became involved in debt, and in a suit brought by his creditors in the circuit court of Dickenson county his interest was sold and purchased by his brother, William B. Sutherland. This sale was made on the 13th of July, 1894, was duly reported to the court, and by it confirmed on the 11th day of February, 1895; but a deed conveying the legal title appears not to have been executed until the 27th day of June, 1901. The evidence is clear and conclusive that from January, 1887, until the institution of this suit on the 13th day of October, 1902, a period of more than 15 years, Jasper Sutherland and his vendee had been in the open, notorious, exclusive, and hostile possession of the land in dispute.

During the progress of the trial the plaintiff in error offered to introduce the record of a suit instituted by Joseph Kelly and others against the heirs of Dale Carter and Mary Campbell. This suit was brought by a number of plaintiffs, citizens of Dickenson county, who had squatted on portions of what is known as the "French lands," for the purpose of setting aside the Imboden compromise, which was an agreement dated February 19, 1883, between F. M. Imboden, as agent for Dale Carter's heirs, and Mary Campbell, and Joseph Kelley, William Sutherland, and a number of others, by which Kelly and others agreed to release the coal and other minerals on the lands then claimed by them, respectively, in consideration that the Carter heirs and Mary

Campbell would release the surface and timber to them. This compromise agreement was never carried into execution, and in 1888 the plaintiffs, Joseph Kelly, William Sutherland, and all of the parties who had signed the compromise save one or two, brought this suit for the purpose of having it vacated and annulled. The devisees of Mary Campbell answered in the case, and numerous depositions were taken. The suit pended for a number of years, and was transferred from court to court until it finally reached the circuit court of Washington county, where it was dismissed; the order of dismissal being as follows: "On motion of complainants, by counsel, Bullitt & McDowell and D F. Bailey, and by agreement of defendants, by their counsel, it is ordered that this cause be dismissed at the defendants' cost, and the cause is retired from the docket." It appears that this dismissal was in pursuance of a voluntary settlement made by the plaintiffs with the Virginia, Tennessee & Carolina Steel & Iron Company, which had theretofore purchased the interest of the Campbells in the land in controversy.

In connection with this suit, the object of the offer of which was to bring the Imboden compromise into this record, an agreement, dated October 7, 1887, between F. A. Stratton and practically all of the parties who signed the Imboden compromise, and also a power of attorney, dated the same day, from the same parties, or the greater part of them, were also offered in evidence. But the court refused to permit the record and papers to be read in evidence to the jury, and in this we think there was no error.

Jasper Sutherland was not a party to the Imboden compromise, nor was he a party to the suit to have that compromise set aside. He is named as a party to the agreement between Elihu Long and others, on the one part, and F. A. Stratton, on the other part, the object of which was to employ Stratton to have the Imboden compromise set aside, and that paper sets out the Imboden compromise quite fully, and may fairly be said to have brought home substantial knowledge of its contents to all who were parties to it. But, though Jasper Sutherland's name appears as one of the signers with his cross-mark affixed, he does not appear from the certificate of the commissioner in chancery as one of those who acknowledged its execution before him. There is no evidence that Jasper Sutherland can read. There is the presumption, from the fact that he signed his name with a cross-mark, that he cannot read; and there is no evidence in the record which proves or tends to prove any knowledge on his part of the contents of the paper known as the Imboden compromise. His name appears also in the power of attorney from Sympson Dyer and others, the object of which was to create F. A. Stratton an attorney "to settle up in full all business for us as it relates to the land

now owned or occupied by us at the time of the compromise made and entered into by and between F. M. Imboden, as agent for Dale Carter's heirs," etc. This paper is also signed by Jasper Sutherland with his cross-mark, and his name appears as one of those who acknowledged it before D. B. R. Sutherland, a commissioner in chancery. But we do not think that this is sufficient to charge him with knowledge of the terms of that compromise, and, therefore, that all of these papers were properly excluded.

There was an effort to prove that Jasper Sutherland never laid claim to the coal subsequent to the Imboden compromise; but all that could be extracted from any of the witnesses was that the question was never raised, and that they never heard anything said upon the subject, while Jasper Sutherland in his deposition (and he is a disinterested witness) states positively that he asserted entire ownership over all of the land, including the coal. There was an effort to prove by a witness that Jasper Sutherland had admitted to him that the Interstate Coal & Iron Company owned the coal on the land in controversy; but it appears that at the time of the alleged admission Jasper Sutherland had been deprived by the proceedings in the chancery suit brought by his creditors of all interest in the premises, so that no admission of his prejudicial to the interests of his vendee could properly be admitted. He was at the time of the alleged admission occupying the land as a tenant of his brother and vendee, William B. Sutherland, and no admission of his in derogation of his title could be binding upon his vendee.

It seems that William Sutherland and others executed a release deed of this property to the Virginia, Tennessee & Carolina Steel & Iron Company in 1894, and that Jasper and William B. Sutherland refused to sign this deed, and the witness by whom their refusal was proved was asked if Judge Richmond, the attorney engaged in the endeavor to perfect the title of this land in the Virginia, Tennessee & Carolina Steel & Iron Company, considered it necessary for Jasper and William B. Sutherland to sign this deed of release. The court excluded this evidence, and in this ruling we are of opinion that there was no error. We cannot see upon what principle the opinion of Judge Richmond could be regarded as a fact to be considered by the jury in the trial of the issue before them.

It is true that the ownership of coal or other underlying mineral may be separated from the surface by a deed of record, and that thereafter there will be two estates in the same land (Va. Coal & Iron Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020), and where such separation has taken place the owner of the surface of the land and the owner of the minerals under it are neither joint tenants nor tenants in common. "They are not the owners

of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures. The title to the freehold of the one, either in the surface or the minerals, cannot be acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not inure to the benefit of the other." But the presumption, we think, is that the owner of the surface owns all beneath and above the surface, and the burden is upon him who is interested to prove that there has been a severance of the interest and title by a deed of record, or by proof of such facts and circumstances brought home to the party sought to be charged as will affect his conscience with notice of adverse rights or will serve to put him upon inquiry which would lead to such knowledge.

In this case the severance of the ownership of the coal from the ownership of the surface was brought about, if at all, by the Imboden compromise. That agreement was never executed. Jasper Sutherland was not a party to it. It does not appear in his line of title. It was never recorded, and it is not shown by the evidence that he had any other knowledge of it than such as was derived from his presence at a numerously attended meeting called to inaugurate a movement to set aside that compromise, where the subject seems to have been discussed, but without any proof that he took part in the discussion or was informed with reference to it. He is not a party to the first agreement with Stratton, in which the terms of the Imboden compromise are set out, and the power of attorney which he signed with his cross-mark and acknowledged before a commissioner in chancery is insufficient to bring home to him knowledge or notice of the contents of that compromise. We are of opinion, therefore, that upon all of these subjects the ruling of the circuit court was without error.

The court gave to the jury, at the instance of the defendants, certain instructions, which were objected to by plaintiff in error, and among them were the following:

"The court instructs the jury that if they believe from the evidence that in June, 1861, Jacob Chaney entered into possession of the land in controversy under color of title describing the whole thereof, and that in 1864 he (the said Chaney) sold said land to Wm. Sutherland, by a writing describing the same, and that Wm. Sutherland then, or shortly afterwards, gave the said land to his two sons, Jasper Sutherland and E. T. Sutherland, and that Jasper Sutherland went on said land, cleared, cultivated, and improved the same, and held possession thereof openly, notoriously, and continuously for 10 years after January 1, 1869, then good title to said land in controversy, and each and every part and parcel thereof, was thereby vested in him (the said Wm. Sutherland) which could not be divested except by deed, and that after said 10 years had elapsed neither said Wm. Suther-

land, Jasper Sutherland, nor E. T. Sutherland could by any act short of a conveyance divest themselves of the legal title to said land or any part thereof; and if the jury so believes they shall find for the defendants.

"The court further instructs the jury that if they believe, from the evidence in this case, that the land in controversy is included in the deed from Jacob Blair to Jacob Chaney of 1861, offered in evidence, and that the said Chaney afterwards sold the said land by a written contract to Wm. Sutherland in 1864, and that said Wm. Sutherland gave the said land to Jasper Sutherland and Elijah Sutherland, and that the said Jasper Sutherland took the actual possession of said land pursuant to said gift, and remained in the actual, continuous, and exclusive possession thereof, claiming the same as his own, for the period of 10 years from the 1st day of January, 1869, then the jury should find for the defendants."

These instructions present questions of law upon which we do not feel that it is necessary to pass. They refer to the possession of Jasper Sutherland between 1864 and the date of William Sutherland's deed to him in 1887, and, even if it were shown that they were erroneous, the error ought not to affect the verdict of the jury; for if, as we have held, there was no error in the ruling of the circuit court upon the admissibility of evidence, then from the date of the deeds of William Sutherland to Jasper Sutherland, in January, 1887, and February, 1888, Jasper held adversely to all the world under color of title, and at the date of the institution of this suit that adversary possession in Jasper and his vendee, William B. Sutherland, had continued for more than 15 years, and had ripened into a good title; and upon the facts the jury could not have found any other verdict.

There were several other instructions given at the instance of defendant in error, which were excepted to.

The third of those instructions is as follows: "The court instructs the jury that, even should they believe that E. T. Sutherland did not claim one-half of the coal in controversy between the year 1882 and the date of the sale of his interest to his brother Jasper, that fact shall be treated by the jury as wholly immaterial in this case."

This is certainly true, if the view we have taken of the case be correct, and the giving of this instruction was proper.

What was said with reference to the third instruction applies with equal force to the fourth.

The other instructions given at the instance of defendant in error are free from objection, and do not require extended discussion.

Plaintiff in error asked for several instructions which the court refused to give. The first should not have been given, because it is predicated upon the idea that Jasper Sutherland did

not claim the coal and other minerals in and under the land, when the proof is positive to the contrary. The refusal of the second is, in our view of the case, to say the least of it, immaterial, because it states that Jasper Sutherland had no color of title to the land in controversy until January, 1887, and that defendants could not rely upon adversary possession prior to that date, which is the view upon which we have decided the case. The other instructions are all predicated upon evidence which we have held was properly excluded.

We are of opinion that the judgment of the circuit court should be affirmed.

On Rehearing.

WHITTLE, J. This case is before us upon the award of a rehearing to a former decision rendered November 23, 1905.

The principle assignment of error to which our attention has been directed in the petition for a rehearing grows out of a conclusion of the court founded upon an incorrect copy of the certificate of acknowledgment to an agreement between Jasper Sutherland and others, of the one part, and F. A. Stratton, of the other part, dated October 7, 1887. It appears that Jasper Sutherland's name and cross-mark, unattested, was attached to the agreement, but his name did not appear in the certificate of acknowledgment. Upon that record the court therefore held that notice of the contents of the agreement could not be imputed to Jasper Sutherland and that the paper was rightly excluded from the evidence. Thereupon the plaintiff in error presented its petition for a rehearing, calling our attention to the fact that Jasper Sutherland's name did appear in the original certificate, and was by mistake transcribed as "Joseph Sutherland" in the former record, and assigned that and other reasons as grounds for rehearing the decision.

In considering the ruling of the court with respect to the exclusion of the Stratton agreement, to appreciate the significance of that decision, it is proper to remark that the trial court had already excluded the record of the suit in equity instituted by Joseph Kelly and others against the heirs of Dale Carter and Mary Campbell for the purpose of setting aside the Imboden compromise, which compromise agreement was filed as an exhibit with the rejected record. For reasons satisfactory to the court, the action of the circuit court in ruling out that record was affirmed. It is clear, therefore, that the rejection of the Stratton agreement and power of attorney was corollary to the previous ruling.

The sole purpose for introducing the Stratton agreement and power of attorney was to affect Jasper Sutherland with notice of the Imboden compromise; but the court had already held that the Imboden compromise and the suit brought to annul it had no place in this record; and a fortiori subordinate papers in rela-

tion to the same subject-matter were likewise immaterial and inadmissible in an action of ejectment.

The objection to the introduction of these documents was general, and, if for any reason they were inadmissible, the ruling of the trial court in excluding them must be sustained. While basing the rejection of the Stratton agreement upon a different ground from that upon which it was rested in the former decision, we are nevertheless of opinion that it was rightly excluded.

It may also be observed, as affecting the probative value of the Stratton agreement, that it bears date October 5, 1887, whereas the deed from William Sutherland to Jasper Sutherland was executed January 15, 1887, about nine months previously. In this connection the court, in its former opinion, observes: "The evidence is clear and conclusive that from January, 1887, until the institution of this suit on the 13th day of October, 1902, a period of more than 15 years [the limitation being only 10 years west of the Alleghany mountains], Jasper Sutherland and his vendee had been in the open, notorious, exclusive, and hostile possession of the land in dispute."

For the purpose merely of excluding a conclusion, we desire to say that nothing in the discussion of the factum and the acknowledgment of the Stratton agreement in the former opinion of the court was intended to alter or modify the rule enunciated in Board of Supervisors, etc., *v.* Dunn, 27 Grat. 608, and that line of authorities, to the effect that "a person who signs, seals, and delivers an instrument as his deed will never be heard to question its validity upon the ground that it was not acknowledged by him nor proved at the time of delivery. It is the sealing and delivery that gives efficacy to the deed, not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment or proof in court essential to the validity of the instrument."

The remaining grounds alleged in the petition to rehear have been sufficiently discussed and disposed of in the opinion of the court on the former hearing, and do not demand further notice.

For obvious reasons, we cannot comply with the request of counsel to declare, if we should be of that opinion, that plaintiffs in error have an equitable title to the minerals underlying the land in controversy. The functions of this court are exhausted when it has ruled upon the specific assignments of error submitted, and a mere advisory opinion, touching extraneous questions, expressed for the purpose of influencing future litigation, would be gratuitous and unwarranted.

Upon the whole case, we are of opinion to adhere to the previous decision, and to affirm the judgment of the circuit court.

KEITH, P., absent.